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Legal problems and powers inherent in ecosystem management

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Abstract

The idea of ecosystem management is elusive, but it is not nearly as novel as many have assumed. There are difficulties inherent both in the lack of semantic precision and the multiple ownerships faced by ecosystem management. There are precedents for regulatory systems that transcend sovereign and ownership boundaries. At the federal level, Congress has adequate constitutional power to ordain ecosystem management. Exercise of that power will rarely if ever constitute a taking. Congress implicitly has authorized the federal land-management agencies to manage for ecosystem sustainability within reservation borders, but federal agencies lack power to force ecosystem restraints on adjoining landowners.

INTRODUCTION: SPECULATIONS ON HYPOTHETICAL QUESTIONS

Discussing "Legal Problems in Transboundary Ecosystem Management" necessarily is an exercise in speculation. Forecasting legal consequences is a hazardous business in any context, but it is more difficult when contemplating such an amorphous concept as "ecosystem management" than in most instances. The difficulties spring from various sources:

1. The common phraseology is rife with words that lack precise definition.
2. The subject apparently is as much political as scientific or legal, and perhaps more so.
3. Legislative guidance is lacking.
4. Human conceptual abilities are limited.
5. American legal, managerial, and scientific histories militate against wider or deeper regulatory constructs.
6. Fragmentation of law, ownerships, sovereignties, and systems complicate the picture enormously.
7. Anti-federal attitudes in the West, coupled with fears of regulation and of higher costs, are bound to inspire emotional opposition.

On the other hand, the current movements toward and sentiment for ecosystem management carry with them many hopeful portents and possibilities. Even such an ambiguous notion is capable of being translated into far more balanced and effective land-management strategies. More fundamentally, ecosystem management if generally accepted offers the promise of breaking out of the ruts of legal, economic, and scientific history in the Western United States (and elsewhere, of course). The peculiar history of the West has long mired progress concerning rational natural resources allocation there (Coggins 1994).

Change is long overdue. The West is a far different place than it was just a few decades ago. Consider this one fact: more people are employed by the Mirage Hotel in Las Vegas than are employed in all areas of agriculture in all of Nevada. And in spite of the relatively depressed state of all natural-resources industries in the Intermountain West over the past decade, that area is the fastest growing, economically, in the nation (Rasker 1994).

The major legal questions necessarily arising from ecosystem management, as generally visualized, are these:

1. Does any government, and especially the federal government, have power to require nongovernmental owners to refrain from doing things that are inconsistent with ecosystem management?
2. Assuming such a power, are the regulated landowners entitled to compensation for a "taking" of their property rights or interests?
3. Assuming such a power, has the Congress authorized any federal agency to exercise it, and if so, to what extent?

After laying out some semantic and precedential background, this paper will address those questions in that order.

THE PROBLEMS OF SEMANTIC IMPRECISION

No amount of semantic refining can change the fact that "ecosystem management" will always be an arbitrary, artificial, and amorphous concept. Neither "ecosystem" nor "management" is susceptible to an agreed, definitive meaning. Nor are many of the allied terms in common usage.

First, it is impossible to define or delineate a self-contained ecosystem. No matter how large an area is designated, or by what criteria, the area is always connected to or dependent upon other stuff, other areas, or other people. One can, for example, draw lines around what you decide is the "Greater Yellowstone Ecosystem," but the transient or alien components of that ecosystem will be unimpressed by your remapping efforts. The air, the water, the birds, and so forth are there only temporarily, on their way to somewhere else. Similarly, any area chosen is subject to activities thousands of miles away, such as manufacturing plants that originate acid rain. Ultimately, the whole business is powered by an engine 93 million miles away which is impervious to human management. And, of course, the system is dynamic; change is the only constant.

The inability to define or designate with any real scientific precision does not of course render the ecosystem-management concept futile or irrelevant. In fact, this symposium, in which speakers universally recognized the lack of precise meaning, demonstrates that imprecision may be a positive strength, at least initially. Natural- resources managers have long lived with terms that were never precisely defined, terms such as "conservation," "fair," "environmental," "efficient," "sustained yield," and so forth (e.g., Coggins 1981a). The necessity of mapping, of creating new boundaries, is not obviated by the understanding that such boundaries cannot ever be perfect. In spite of obvious semantic problems, there are, just as obviously, enough common strands in the commentaries to import some real degree of meaning into the notion.

The first idea inherent in ecosystem management has to do with scope: proponents argue persuasively that the management focus must be wider and deeper (e.g., Keiter 1994). The primary consequence of that focus is a relative disregard for established human boundaries in favor of new boundaries founded on different criteria (Keiter 1989, 1994). Within the relevant ecosystem area, as geographically delineated, managers contemplate land-use planning of greater or lesser formality resulting in land-use controls as the main mechanism to achieve the broader focus. In the end—and although proponents seldom put it so bluntly—they contemplate a system in which all landowners within a designated area will be forced into doing or refraining from doing certain things (e.g., Sax 1993). The private owners will not like it.

But ecosystem management also implies ends as well as means. A major objective of most proponents apparently is biodiversity preservation (Keiter 1990, 1994, USFS 1993). Also implicit in the ecosystem-management concept are such things as consideration of cumulative environmental effects from all causes acting on the chosen ecosystem (e.g., Keiter 1990). The new "balance" sought by ecosystem managers will emphasize continued future productivity of all resource values more than has typically been the case on public or private lands (Coggins 1981b, 1994). Subordination of commodity production, or at least marked deemphasis, is a common theme.

Finally, though not exclusively, ecosystem management premised on broader planning should be more proactive than reactive (e.g., Keiter 1994). If these changes are ever accomplished, it will indeed be a revolutionary development in public natural- resources law (Coggins 1994, Coggins and Glicksman 1990).

So far the discussion has concerned the first word in the phrase "ecosystem management," but the second word is just as problematic, if not more so. "Management" may be the commonest word in all of public-land and resources law, not to mention many other contexts. We speak of land management, multiple-use management, intensive management, wildlife management, demand-side management, wise management, and all kinds of management. And yet, what exactly does the word mean? One version is that it means "the organization or coordination of natural resource uses" (Loomis 1993). That is simply far too vague to be helpful. The only good definition of "management" yet located is: "that which managers do" (Coggins and Ward 1981). In the end, what managers do is to manipulate people and things, sometimes for predetermined ends (Trustees 1981).

Somewhat the same could be said about "science." The word has an almost metaphysical resonance of impartial rationality. Given that scientists are also human, that stern view bears little relationship to the realities of science in practice, where unscientific politics seem to be as rampant as elsewhere (e.g., Weinstein 1991). The natural-resource sciences long have operated with assumptions and techniques that have more to do with the uses of the supposedly scientific information than with the neutral, unvarnished truth (Coggins 1984).

THE PROBLEMS WITH SOVEREIGN AND OWNERSHIP BOUNDARIES

Human boundaries are one of the biggest obstacles that ecosystem management is likely to face, because natural systems and fauna seldom respect lines drawn on maps. The Anglo-American legal system (and most others) demands boundaries for reasons both of sovereignty and ownership, but the present boundaries for both purposes bear only incidental relationships to ecosystems.

In the East, most land is private. In the West, however, the federal government is the 800-pound, landowning gorilla, and the states retain significant ownership in the blue rash, state-section patterns (Bruce and Rice 1994). Further, the private owners homesteaded or outright stole the most productive lands and water rights (Coggins 1994). Every category of landowner will be resistant to common regulation for one reason or another.

The federal lands are not monolithic nor homogenous. They have been divided and zoned into almost innumerable categories, and are governed by four different agencies (Coggins and Glicksman 1990). The classification of a federal parcel, not its geology or biology, defines permissible, mandatory, or prohibited human activities on it, like a super zoning system. Zoning fragmentation is bound to complicate ecosystem management, especially since the federal agencies do not always cooperate fully with one another (Sax and Keiter 1987).

State land ownership is a problem for a different reason. States are not free to do with state-owned lands whatever they want to. They are instead required by law to obtain fair-market value for use of them and to devote the proceeds exclusively to public education (Fairfax et al. 1992, Bruce and Rice 1994). So, even in the rare case when state and federal managers are in full agreement over an ecosystem-management regime, state-trust law may prevent state managers from carrying out the agreement.

Private ownership of land in the West will be an even bigger obstacle to ecosystem management. Western private landowners have the best lands and the worst attitudes (Coggins 1994). Start with inholdings: some are in fee, and some—such as grazing permits or unpatented mining claims—are partial or temporary, but they are all private property of some sort (Laitos and Westfall 1987, Mansfield 1993). Add the transcontinental railroad checkerboard-ownership patterns (Leo Sheep 1979), the strip holdings along streams (Gates 1968), and the anti-federal hostilities in the rural West: the result is a mess.

Divisions in ownership and sovereignty are bound to complicate ecosystem management because different owners and different sovereigns have different objectives. Voluntary cooperation is unlikely if money or independence are at stake. Sweet reason and cooperation are not prominent western characteristics. These are not insuperable obstacles, however.

QUESTIONS OF PRECEDENTS, POWERS, AND PAYMENTS

The fact is that governments at all levels have long found it necessary or expedient to enter into binding transboundary agreements or to commence transboundary projects that incidentally governed and coerced private landowners and other governments. These precedents have resulted in judicial opinions demonstrating that at least certain forms of transboundary regulation are beyond reasonable constitutional challenge.

DEVELOPMENTAL PRECEDENTS

Consider for a moment the developmental history of this country. Canals, railroads, reclamation projects, flood-control projects, interstate river compacts, hydropower developments, and so forth—all of these were transboundary in nature (Gates 1968). And, in every such case, courts agreed that the federal and state governments were empowered to encourage or undertake such internal development projects (Leo Sheep 1979, Gerlach 1950, Oklahoma 1941, Texas 1983). On a lower level, it is now common and accepted to force unitization of oil and gas fields for the overall benefit of all owners and for public purposes (Kramer and Martin 1989).

INTERNATIONAL PRECEDENTS

Transboundary arrangements also are common at the international level. The United States is a party to treaties that allocate and protect natural resources and that even call for cooperative or joint management of certain land and water areas. Migratory birds (Coggins and Patti 1979) and the Great Lakes (Frances 1989) are examples. The Supreme Court held in 1920 that federal legislation implementing a treaty was valid even if Congress otherwise lacked power to legislate in the disputed area (Missouri 1920).

REGULATORY PRECEDENTS

In recent years, Congress has often used transboundary mechanisms for land and resource protection. In terms of transboundary or migratory resources, two wildlife examples stand out. First, migratory birds. Three or four generations ago, the federal legislature saw that a state-by-state approach could not rescue or preserve a national resource, so the federal government took the lead in establishing an international, national, regional, state, and local regulatory system (Migratory Bird Treaty Act of 1918, Coggins and Patti 1979). The key is comprehensiveness. No migratory bird can be killed or captured without either direct or indirect permission from the regulators (MBTA § 703, 704, 712). By and large, the Migratory Bird Treaty Act has worked well, especially in contrast to the ad hoc chaos it replaced.

Experience under the Endangered Species Act (ESA 1973) provides even more telling examples. Originally, the ESA was only invoked in crisis situations (TVA v. Hill 1978). Now, with its critical habitat provisions being implemented, the ESA has become a quasi-ecosystem management statute (Keiter 1994, Flournoy 1993, Seattle Audubon 1991, Trinity County 1993, Northern Spotted Owl 1991). The northern spotted owl has brought logging in the Pacific Northwest old-growth forests to a screeching halt (Jefferson 1993). That likely is but the tip of the future iceberg. When the salmon runs that should be listed are listed, every cause of endangerment, and they span a wide spectrum, will come under critical scrutiny (Wilkinson and Conner 1983). All this of course is totally or mostly independent of ownership or sovereign boundaries. In fact, a court in Hawaii ordered the state to remove herds of sheep and goats from a state-owned mountain because they were destroying the habitat of an endangered bird (Palila 1988, but cf. Sweet Home 1994).

JOINT LAND MANAGEMENT PRECEDENTS

Even more to the point is the recent trend of creating multiple-jurisdiction areas for joint management under federal leadership. The New River Gorge National River (NPRA § 460m-15, Moore 1986), the Pine Barrens in New Jersey (NPRA § 471, Collins and Russell 1988), the Tahoe Basin (Strong 1984, Fink 1991), and the Columbia River Gorge National Scenic Area (Blair 1987) all have in common diverse ownership and diverse sovereigns operating under jointly-agreed land-use controls (Coggins and Bergstrom 1994).

Courts have held for a century that the United States has power to regulate use of adjacent private or state lands if that land use threatened to interfere with the purposes for which the federal tract had been reserved (Camfield 1897). Thus, for example, the federal government can outlaw snowmobile use on private land within a federal canoe wilderness area (Minnesota 1981). Congress has taken that basic notion much further in creating special management areas in which

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most of the land is privately owned, but all owners must jump to the federally orchestrated zoning tune.

The most elaborate and far-reaching mechanism of this kind is the Columbia River Gorge area. There, the states entered into a compact, approved by Congress, for creation of a joint zoning and management authority in cooperation with the federal land- management agencies (Blair 1987). Even though the new interstate authority can impose extremely restrictive land-use controls to protect the scenic and ecological integrity of the area without compensation, a half dozen court decisions have upheld the new system (CGU-PPP 1992, Broughton Lumber 1991, 1994, Klickitat County 1991, W. Birkenfield 1993).

PRECEDENT AND POWER SUMMARY

The basic point is that regulation or management extending over ownership or sovereign boundaries is hardly a novel idea. Boundaries are not forever and always immutable or impermeable. In the case of the federal lands only, Congress could, tomorrow, change the boundaries between management systems it had earlier established. It could, for instance, abolish the BLM as a land manager, put all of its lands under the Forest Service, and solve many jurisdictional problems instantly (Coggins 1994). State boundaries cannot so easily be changed, but interstate compacts can overcome such obstacles (Feldman 1992). Similarly, private-property rights have never been absolute: state and federal governments can define and regulate interests in real estate and uses made of it in innumerable ways (Laitos and Westfall 1987, Mansfield 1993) The wisdom of strict land-use controls for whatever purpose always is debatable, but the constitutionality of their imposition is seldom even debatable (Euclid 1926, Locke 1985, Midkiff 1984).

PAYMENT FOR TAKING?

Will the federal or state governments have to pay any landowner whose lands are economically affected by ecosystem management? Almost certainly not. In order to constitute a taking under the Fifth Amendment, the government must either take title and possession (which will occur only if there is a formal eminent-domain proceeding) or almost totally destroy all monetary value of the property for insufficient reason (Lucas 1992, Agins 1980). The latter test is very difficult for a landowner to meet. Since 1922 (Mahon 1922), the United States Supreme Court has only once decreed that a taking occurred, and that concerned the imposition of an easement across private beach property (Nollan 1987). Examples of actions that did not amount to takings include:

1. Protected wild horses eating private grass (MSLF 1986).
2. Grizzlies killing private sheep (Christy 1988).
3. Forfeiture of a mining claim for being one day late in filing (Locke 1985).
4. Air pollution regulations that force a factory to shut down (Union Electric 1976).
5. Denial of right to sell birds legally taken (Allard 1979).
6. All kinds of zoning (Euclid 1926).

QUESTIONS OF CONGRESSIONAL AUTHORIZATION

Whether the federal government has power to coerce landowners and whether it has to pay for their discomfiture are the easy questions. Whether Congress has authorized its agents, the land-management agencies, to manage on a transboundary ecosystem basis is more difficult. Agencies have only those powers that Congress has delegated to them (Stein 1977). Congress has never specifically said to any agency, go and manage ecosystematically. Still, however, this paper concludes that each of the four federal agencies has adequate authority to practice ecosystem management, but only within the borders of the federal reservations.

INTERNAL ECOSYSTEM MANAGEMENT

Although each agency has somewhat different statutory mandates and missions (Coggins and Glicksman 1990), all are premised to a considerable degree on what can roughly be characterized as ecosystem health. The multiple-use, sustained-yield laws that supposedly govern the Forest Service and BLM specifically state that all surface resources are to receive equal consideration and use of them cannot impair the productivity of the land for any of the others (MUSY §§ 528-531, FLPMA §§ 1702, 1732). Further, both agencies are instructed to manage for watersheds, which is a shorthand way of saying ecological stability (Coggins 1991). The Park Service and the Fish and Wildlife Service have even broader mandates (NPSA § 1, NWRSAA § 668dd). All four agencies have the power, not always exercised, to tightly control human activities even if they cannot outright forbid them. Finally, in virtually every situation where ecosystem management will be seen as necessary, other federal and state laws, from the ESA to the Clean Water Act, and from FLPMA to the Wilderness Act, likely will have a pro-ecosystem bearing.

TRANSBOUNDARY ECOSYSTEM MANAGEMENT

This paper's final conclusion will be less popular with the environmental ideologues in the audience. That is: current law does not empower any of the four federal agencies to extend their regulatory reach across existing boundaries to state or private land use, even if the target is in the same ecosystem. All can enter into cooperative agreements with adjacent landowners, but the power to coerce them is lacking.

Thus, additional legislation will be required before ecosystem management will become a transboundary reality (Coggins 1994). Senators and representatives have proposed relatively small-scale versions, such as the park protection bills of the mid-1980s, but none has been enacted (Coggins 1987, Keiter 1985). In some cases, such as the Everglades, existing law provides limited means for abating activities harmful to the park ecosystem occurring on private property. But there simply is not any general statutory authority for the federal agencies to impose ecosystem-protection requirements on state and private landowners.

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